

**AMBULANCE SERVICE &
TRANSPORT OF MARLIN****CONTRACT NO. V611-864
CONTRACT NO. V611-912****VABCA-3485
VABCA-3486****VA MEDICAL CENTER
MARLIN, TEXAS**

Diane Williams, Partner, Ambulance Service and Transport of Marlin, Marlin, Texas, for the Appellant.

James Petersen, Esq., Trial Attorney, Washington, D.C., for the Department of Veterans Affairs; *Phillipa L. Anderson, Esq.*, Deputy Assistant General Counsel; and *William E. Thomas, Jr., Esq.*, Office of General Counsel, of counsel.

OPINION BY ADMINISTRATIVE JUDGE ROBINSON

These appeals are from final decisions by the Contracting Officer (CO) in which he denied claims brought under two consecutive fiscal year ambulance service (requirements) contracts between Appellant and the Marlin, Texas, VA Medical Center of the Department of Veterans Affairs (VA or Government).

The Appellant, Ambulance Service and Transport of Marlin (ASTM or Contractor), contends that the VA's yearly estimates of its ambulance service requirements were negligently prepared and that the significant errors resulting from the VA's negligence amounted to breaches of both contracts. ASTM additionally charges that the VA unjustifiably diverted contracted trips for ambulance services to other sources in violation of the terms of the contract.

The Government rejects both positions, contending that the estimates were prepared in good faith using the best available historic data combined with the anticipated future needs of the VA. The Government further defends against the diversion claims by alleging an unwillingness or inability of ASTM to respond to many service calls, resulting in the need to go "off contract." Even were it liable for the alleged breaches, however, the VA charges that the Appellant has failed to satisfactorily prove its asserted damages of \$10,765 for Fiscal Year 1990 (FY 90) and \$32,997 for Fiscal Year 1991 (FY 91) with any degree of reliability.

A hearing was held in Waco, Texas. Both entitlement and quantum were at issue. The record upon which the Board bases its decision consists of the hearing transcript, the Government's Rule 4 file (tabs 1-14), and Appellant's Rule 4 supplement (tabs 101-116). Post hearing briefs were filed by both parties.

**GENERAL FINDINGS OF FACT
(BOTH APPEALS)**

Prior to entering into the captioned FY 90 and FY 91 ambulance service requirements contracts with the VA, one of the ASTM partners, Ms. Diane Williams, had worked for

Mr. Dorsey Keats as an employee of DK Ambulance (DKA). Ms. Williams and her partner, Mr. Charles Bone, subsequently acquired the firm from Keats, leased the former DKA ambulances, and changed the company name to Ambulance Service and Transport of Marlin. (Tr. 112-13; 72)

During FY 89, the VA had contracted for all of its ambulance service requirements with another firm, Falls County EMS. During that period, the ambulance contractor experienced 46% less service calls than were indicated by the VA's estimates - 340 versus the contract estimate of 625. (Tr. 127-28, 213-17). There is no evidence that Ms. Williams or anyone else connected with ASTM was aware of the FY 89 shortfall at the time that the Appellant submitted its bids for the FY 90 and FY 91-93 contracts. Ms. Williams testified that she first learned of the prior year's shortfall early in 1992 (during this litigation), when she was so informed by someone from Falls County EMS. (Tr. 134)

The VA relied upon Mr. Gene Quindlan, Chief of Medical Administration Service (MAS) at the Marlin VA Medical Center (the VAMC) to estimate its ambulance service needs for FY 90 and FY 91-93. Mr. Quindlan testified that he relied upon prior years' "workload figures" to prepare his estimates for FY 90 and FY 91-93. With respect to future projected workload, Mr. Quindlan stated that, while the projected outpatient visits were factors to be utilized, "the significant figure was based on inpatient admissions and discharge and hospital patient figures more than outpatient figures." (Tr. 209-16, 220)

Mr. Quindlan prepared his estimates for FY 90 ambulance services (460 trips) based on the hospital's projected veteran care needs. With respect to a reduction in the number of hospital beds (from 202 to 160), he stated that "We had closed beds at the hospital and it was obvious to me that if you have fewer operating beds, you're going to have fewer active patients." The witness stated that he relied on records of prior years' ambulance services rendered to prepare both the FY 90 and FY 91 estimates. With respect to the FY 90 estimates, Mr. Quindlan failed to specifically address the 46% shortfall which the previous contractor had experienced during FY 89. In fact, until confronted with a copy of that contract during cross-examination, Mr. Quindlan denied that there was even a contract for FY 89 services. With respect to the preparation of the estimate for FY 91 services, Quindlan had prepared it prior to being activated for duty in the Persian Gulf in August of 1990. He thus was not present at the hospital when the VA deleted the Emergency services after being told by Ms. Williams that she was not receiving the number of calls which had been estimated by the VA in the FY 90 contract. (Tr. 209-25)

On May 14, 1990, in Director's Bulletin No. 90-51 (the Bulletin), the Marlin VAMC issued guidance for preparation of the hospital's FY 1991 Budget Plan. The data contained in the Bulletin consisted of actual workloads experienced in Fiscal Years 1986 through 1989, as well as the workload plan for the then-current FY 90 and the projected workload for FY 91. The statistics given were in six categories. The first major category showed medical bed capacity of the hospital. Whereas the capacity for FY 86 through FY 89 had been stable at 202 beds, the FY 90 plan and the FY 91 projection showed a decrease to 160 beds. Likewise, in another major category of "inpatients treated," there was a decrease from 3,060 in FY 89 to 1,900 for FY 90 and FY 91. Conversely, the number of "outpatient visits" rose from an actual 12,500 in FY 89 to a planned 14,380 in FY 90 and to a projected 16,000 in FY 91.

Mr. Bernard Jesko was the Chief of MAS at the Marlin VAMC from July, 1981 until October, 1988. In that capacity, he had worked with contracting officers in preparing yearly ambulance service contracts. He testified (on Appellant's behalf) that, in order to prospectively estimate the hospital's annual needs for ambulance services, several types of data are essential. First, the number of calls placed during previous years must be considered. The most recent past year's experience is most reliable, and the hospital's actual patient workload, current to the time that the estimate is prepared is obviously of equal importance. It is also necessary to factor into the estimate any available data concerning future patient needs for such services. As an example, if a hospital ward was scheduled to be closed during the upcoming fiscal year(s), the estimates for patient transport needs would be adjusted accordingly. (Tr. 12-13, 18, 25) Although the Government questioned the motives of this witness in testifying, it did not rebut the substance of his testimony. The Board finds the criteria listed by Mr. Jesko to be a reasonable basis for the preparation of patient trip estimates for VA ambulance service requirements contracts.

Since he had been Chief of MAS during the summer of 1988, Mr. Jesko had a role in preparation of the solicitation for FY 89 ambulance services. While he could not recall the precise details of estimating the VA's needs for that period, he was confident that he had followed the described procedure of examining prior and current year needs as well as any known factors impacting on future needs. (Tr. 39-40)

Both of the contracts at issue contained the following clauses mandated by the Federal Acquisition Regulations (FAR) for use in requirements contracts: 52.216-18 ORDERING. (APR 1984); 52.216-19 DELIVERY-ORDER LIMITATIONS. (APR 1984). In addition, the contract included these FAR clauses: 52.232-11 EXTRAS (APR 1984), with the CO delegated authority to pay for extra services in excess of the contract rate; 52.246-4 INSPECTION OF SERVICES - FIXED PRICE (APR 1984); 52.249-4 TERMINATION FOR CONVENIENCE OF THE GOVERNMENT (SERVICES) (SHORT FORM). (APR 1984) (R4, tabs 2, 6)

Particularly relevant to these appeals is the following mandated clause which is also included in the two contracts, relevant portions of which are set forth below:

FAR 52.216-21 REQUIREMENTS. (APR 1984)

- (a) This is a requirements contract for the supplies or services specified, and effective for the period stated, in the schedule. The quantities of supplies or services specified in the schedule are estimates only and are not purchased by this contract. Except as this contract may otherwise provide, if the Government's requirements do not result in orders in the quantities described as "estimated" or "maximum" in the Schedule, that fact shall not constitute the basis for an equitable price adjustment.
- (b) Delivery or performance shall be made only as authorized by orders issued in accordance with the Ordering clause. Subject to any limitations in the Delivery-Order Limitations clause or elsewhere in this contract, the Contractor shall furnish to the

Government all supplies or services specified in the Schedule and called for by orders issued in accordance with the Ordering clause. The Government may issue orders requiring delivery to multiple destinations or performance at multiple locations.

(c) Except as this contract otherwise provides, the Government shall order from the Contractor all the supplies or services specified in the Schedule that are required to be purchased by the Government activity or activities specified in the Schedule.

(d) The Government is not required to purchase from the Contractor requirements in excess of any limit on total orders under this contract.

(e) If the Government urgently requires delivery of any quantity of an item before the earliest date that delivery may be specified under this contract, and if the Contractor will not accept an order providing for the accelerated delivery, the Government may acquire the urgently required goods or services from another source.

The contracts required 24 hour ambulance availability to service the veteran beneficiaries of the Marlin VAMC. As an attachment to its bid/contract for the FY 90 ambulance services, the Appellant listed four vehicles which would be utilized to perform the contract. One of these vehicles was required by the contract to be equipped for Emergency service. (R4, tab 2)

The contracts also contained, in Section C, an "ORDERS" clause which specified that requests for the ambulance services could be made either in writing or by telephone. Subparagraph (b) of the clause reads as follows:

If the Contractor fails to furnish ambulance service within